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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON AND ROBBINS, INC.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

REPLY BRIEF FOR THE UNITED STATES

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1. McKesson's brief is principally devoted to a restatement of its thesis that the Miller-Tydings and McGuire provisos (denying protection to resale price-fixing agreements "between wholesalers" and "between persons, firms, or corporations in competition with each other") merely limit the "fair trade" exemption to resale price-fixing agreements between parties having a seller-buyer relationship. Since a seller-buyer relationship is, of course, involved in every "fair trade" agreement, the effect of adopting McKesson's construction would be to render the provisos inapplicable to any and all "fair trade" agreements, even where the parties to such an agreement (as in the instant case) are "wholesalers" and "per-

sons, firms, or corporations in competition with each other" in the ordinary sense of those terms. As more fully argued in the Government's main brief, McKesson's construction strains—indeed, disregards—the language of the provisos (pp. 38–41); permits the evil of "horizontal" price-fixing agreements (pp. 41–48); and ignores important competitive relationships that may also exist between seller and buyer of the "fair traded" commodity (pp. 48–53). No further discussion of these issues appears necessary in the present brief.

2. One important change in McKesson's construction of the provisos, however, should be noted here.

In its briefs to the district court and in its motion to affirm filed in this Court, McKesson urged that the provisos apply only to agreements "between manufacturers of competing products, or between wholesalers of competing products, or retailers of such products, fixing the prices at which *two or more* competitive products are to be sold" (motion to affirm, pp. 5–6, italics in original).¹ But in its brief on the merits in this Court, McKesson takes quite a different view.

¹ Such agreements, it was stated, "are not protected because they destroy brand versus brand competition" (motion to affirm, p. 6). For discussion of McKesson's contention that the provisos apply only to agreements involving two or more competing products, see Government brief, pp. 48–49, 60, 67.

McKesson now states that the provisos also deny an exemption to "contracts made *between wholesalers of the same product* not produced by any of them" (McKesson brief, p. 6, italics added). Stated otherwise, McKesson takes the position that the provisos apply to an agreement between two competing independent wholesalers fixing the price of a McKesson brand product but that the provisos do *not* apply to a similar price-fixing agreement between McKesson and a competing independent wholesaler. Under McKesson's present view, what would be concededly illegal if done between two independent wholesalers becomes legal if done between an independent wholesaler and a wholesaler who is also a manufacturer.

This change in McKesson's position not only narrows the area of disagreement between the parties but also dramatizes McKesson's insistence that its role as a manufacturer is dispositive of the case. For the reasons stated in the Government's brief (pp. 50-52), McKesson's role *as a wholesaler* and *as a competitor* of other wholesalers cannot be so easily glossed over. McKesson is, of course, the largest drug wholesaler in the country. And, in the course of its wholesaling business, McKesson competes with each of the 94 independent wholesalers with whom it has executed "fair trade" agreements. More-

over, the provisos do not distinguish between various operating divisions of companies engaged in price-fixing. For example, the provisos expressly continue Sherman Act prohibitions against resale price-fixing agreements "between persons, firms, or corporations in competition with each other." [Italics added.] Unless these words are to be denied their customary meaning, it is immaterial whether McKesson entered into the challenged agreements as a manufacturer or as a wholesaler; it is sufficient that McKesson competes as a wholesaler with each of the 94 independent wholesalers involved.

3. The area of disagreement between the parties has also been narrowed by McKesson's apparent abandonment of the district court's rationale. The district court, although finding the legislative history of the Miller-Tydings and McGuire Acts to be "unedifying and unilluminating" on the question presented here, concluded that the *per se* doctrine need not be applied "in fair trade situations" and that the challenged agreements are valid in the absence of a showing of "some additional restraint." McKesson turns the district court's rationale upside down; without making any attempt whatever to defend the district court's holding with respect to the *per se* doctrine, McKesson places primary reliance on two isolated statements from the legislative history of the

two Acts.² As a consequence, there would appear to be no further controversy between the parties on the proposition that the *per se* rule applies unless McKesson comes within the terms of the exemption (see Government's main brief, pp. 25-35).

4. McKesson has also chosen to ignore the fact pointed out by the Government (pp. 69-70) that cancellation of the 94 challenged agreements will not curtail McKesson's "fair trade" practices in relation to retailers. Nevertheless, McKesson (p. 23) repeats its dire warning that "the interpretation of the statutes now being urged by the appellant would soon result in the grant of the power to 'fair trade' being substantially swallowed up by the exceptions. . . ."

In support of this statement, McKesson (pp. 19-20) quotes at length from the 1948 U. S. Census of Business. But the statistics there set

² The pertinent legislative history is set forth, in considerable detail and in its context, at pp. 53-69 of the Government's main brief. And see *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494:

"Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co. v. Deering*, 254 U. S. 443, 474; *Lapina v. Williams*, 232 U. S. 78, 90; *United States v. Freight Assn.*, 166 U. S. 290, 318."

See also *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125.

forth are completely meaningless on the question presented here. The statistics merely show that a great many manufacturers operate their own wholesale selling organizations. This is doubtless true and we have never questioned it. It does not follow, however, that the distribution practices of all such manufacturers (or even a small percentage of them) would be affected by a reversal of the decision below. Such a manufacturer would be affected only if three additional circumstances are present: (1) if he distributes his product through independent wholesalers as well as through his own selling organization; (2) if such independent wholesalers are engaged in competition with the manufacturer's selling organization; and (3) if (and only to the extent that) the manufacturer uses "fair trade" agreements with such independent wholesalers to fix resale prices.³ See Government's main brief, pp. 70-71. The census data quoted by McKesson gives no information as to any of these three factors.

McKesson (p. 19) also relies on a survey made by the American Fair Trade Council "of known fair trading manufacturers." This survey purports to show that an overwhelming percentage of "all such manufacturers who responded to inquiries" distributed their products through independent wholesalers as well as through their own wholesale outlets. While this survey at least

³ Even then, as already noted, he would not be prevented from fixing the prices to be charged by retailers.

takes some cognizance of the factors just noted, it is subject to some of the same criticisms made above, as well as others. The survey does not indicate whether the "known fair trading manufacturers" who were sent inquiries even use "fair trade" agreements at the wholesale level; certainly not all manufacturers who "fair trade" at the retail level also "fair trade" at the wholesale level.⁴ The survey also fails to indicate how many manufacturers "responded to inquiries"; absent such information, one can only speculate as to the representative nature of the sample used for the survey. The survey, moreover, does not indicate whether there is any competition between independent wholesalers and the wholesale outlets of manufacturers who sell through both channels; yet, it is only where such competition exists that the Government is attacking the legality of "fair trade" agreements between a manufacturer-wholesaler and independent wholesalers.

It should be noted, additionally, that the American Fair Trade Council can hardly be regarded as an impartial agency in this matter. The Council, as its name implies, is an association of manufacturers who have joined together to promote and defend the cause of "fair trade."⁵ In-

⁴ See, e. g., *General Electric Co. v. S. Klein on the Square, Inc.*, 121 N. Y. S. 2d 37, 56 (General Electric).

⁵ See Hearings before the Antitrust Subcommittee of the House Judiciary Committee on Resale Price Maintenance, 82d Cong., 2d sess., p. 336 *et seq.*

deed, the Council's report of the survey (reproduced at R. 15) shows that the survey was made because of the Government's filing of this and similar cases.

In short, although the case undoubtedly has some significance for some other companies, there is no support for McKesson's statement that the Government's position results in "the grant of power to 'fair trade' being substantially swallowed up by the exceptions." As pointed out in the Government's main brief (p. 71), the Government's construction of the provisos, far from destroying "fair trade," will only insure that "fair trade" is not used as a cover for price-fixing between competitors.

Respectfully submitted.

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